No. 91-6824

In The

Supreme Court of the United States

October Term, 1992

GLORIA ZAFIRO, JOSE MARTINEZ,
SALVADOR GARCIA, ALFONSO SOTO,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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QUESTION PRESENTED FOR REVIEW

Whether criminal defendants are entitled to separate trials when their defenses are mutually antagonistic.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

SUMMARY OF REPLY ARGUMENT

Rule 14 of the Federal Rules of Criminal Procedure provides the means for a trial court to sever defendants for separate trials when it appears that a defendant would be prejudiced by joinder of trial.

When co-defendants present mutually antagonistic defenses, their trial should be severed so as to ensure that each defendant receives the fair trial to which he is entitled.

The important rule that severance plays in ensuring fair trials has long been recognized by the 2nd, 4th, 5th, 6th, 7th, 10th, 11th, and D.C. Circuits. Indeed, the Seventh Circuit's ruling against the Defendants in the instant matter contradicts numerous cases in which it has previously recognized the critical nature of the severance doctrine.

The Seventh Circuit's ruling not only conflicts with its own previous holdings, this decision now places the Seventh Circuit in direct conflict with the above listed Circuits. This new rule fails to acknowledge the dangers posed by requiring defendants presenting mutually antagonistic defenses to be tried together. The Seventh Circuit's decision minimizes the Court's concern for ensuring each defendant a fair trial and instead focuses on its administrative concern for judicial economy.

REPLY ARGUMENT

The government's Brief acknowledges that the purpose of trial is to ascertain the truth, Brief for U.S. at

14-19, and candidly admits that defendants Soto and Garcia may have stood a better chance of acquittal if they had been tried separately. Brief for U.S. at 23-24. The government contends, however, that antagonistic defenses, the basis for the Defendants' request for separate trials in this case, is not sufficient grounds for severance. Brief for U.S. at 16-19.

The Government, however, fails to recognize that subjecting a defendant to a trial when his defense is irreconcilably in conflict with that presented by a co-defendant inflicts an injustice upon both defendants. Under such circumstances a defendant stands accused by two prosecutors, the Government and his co-defendant. Similarly, the jury watches as two parties point accusatory fingers at the defendant. The courts have recognized that if defendants are tried together under such conditions, they do not receive fair and impartial trials. These courts, through the application of Federal Rule of Criminal Procedure 14, have provided the defendants separate trials to protect the rights of the accused.

The language used by the various Circuit Courts of Appeal to articulate the standard used in determining when severance is appropriate to protect the rights of defendants has, not surprisingly, varied from case to case. For example, some courts have stated that severance is required when co-defendants present irreconcilable or mutually exclusive defenses and the jury will unjustifiably infer that the conflicting defenses, in and of themselves, establishes that both defendants are guilty. *See, e.g., United States v. Clark*, 928 F.2d 639, 644 (4th Cir. 1991); *United States v. Walton*, 552 F.2d 1354, 1361 (10th Cir. 1977), *cert. denied*, 431 U.S. 959 (1977); *United States v. Robinson*, 432 F.2d 1348, 1351 (D.C. Cir. 1970). In other

cases, the courts have stated that severance is required if the defenses are inconsistent to the degree that accepting one co-defendant's defense would preclude the jury from accepting the other's defense. *See, e.g., United States v. Rucker*, 915 F.2d 1511, 1513 (11th Cir. 1990); *United States v. Tutino*, 883 F.2d 1125, 1120 (2nd Cir. 1989), *cert. denied*, 493 U.S. 1082 (1990); *United States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981). Still others have indicated that severance is granted when the defendant demonstrates that the antagonistic defenses involved would mislead or confuse the jury. *See, e.g., United States v. Benton*, 852 F.2d 1456, 1469 (6th Cir. 1988), *cert. denied*, 488 U.S. 993 (1988).

However, although the language used to articulate the severance rule varies, the common element found throughout this line of cases is that defendants who present mutually antagonistic defenses should be granted severance, as conducting a joint trial under these circumstances would be unjust.

In *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980), the court provided an example of mutually antagonistic defenses, stating:

> An example of "mutually antagonistic" defenses is presented in *DeLuna v. United States*, 308 F.2d 140 (5th Cir. 1962). In *DeLuna*, one defendant claimed that he came into possession of narcotics only when the other defendant saw the police approach and shoved the drugs into his hands. The other defendant, however, denied having ever possessed the drugs and claimed that they had always been in the possession of the first defendant. In a case such as *DeLuna*, where someone must have possessed the contraband, and one defendant can only deny his own

> possession by attributing possession and consequent guilt to the other, the defenses are antagonistic. *Ziperstein*, 601 F.2d at 285.

Interestingly, this is virtually the identical fact situation presented to the trial court in the instant case. There is no question that contraband was transported in a vehicle occupied by both Mr. Soto and Mr. Garcia, however, each defendant denied having ever possessed the drugs and claimed that the drugs were exclusively in the possession of the other defendant. Similarly, there was no question that contraband had been found in the apartment occupied by both Ms. Zafiro and Mr. Martinez, but each claimed that they were not the individual who possessed the drugs and instead argued that the drugs belonged to the other defendant. As in *DeLuna*, accepting one defendant's version of the facts necessarily resulted in finding the other defendant guilty. The defense presented by each Defendant required them to attack each others' defenses.

Not surprisingly, the Government states that it sees nothing unfair in requiring a defendant to face a co-defendant as an additional accuser. Brief for U.S. at 19-22. In fact, the Government goes so far as to propose that any prejudice which might flow from a co-defendant's acting as a second prosecutor is offset by the benefit the defendant obtains from the presence at trial of another potentially culpable defendant. Brief for U.S. at 20. The fallacy of this argument was clearly enunciated by the First Circuit in *United States v. Romanello*, where the court stated:

> Conspiracy trials, with their world-girdling potential, are given more extensive thrust by the

> admission of hearsay testimony, the use of conspiratorial acts to prove substantive offenses, and the joint trial of defendants. These pressures alone threaten to undermine the fair consideration of individual conspiracy defendants. However, the dangers inherent in joint trials become intolerable when the co-defendants become gladiators, ripping each other's defenses apart. In their antagonism, each lawyer becomes the government's champion against the co-defendant, and the resulting struggle leaves both defendants vulnerable to the insinuation that a conspiracy explains the conflict. *United States v. Romanello*, 726 F.2d 173, 182 (5th Cir. 1984).

Contrary to the Government's contention that there is some benefit to the presence of a mutually antagonistic co-defendant at trial, the *Romanello* court concluded that such a situation is likely to result in a jury unjustly finding the existence of a conspiracy. The court expressed its concern that when co-defendants attack each others' defenses before the jury, they blur together as one and, as a result, both defendants are likely to be convicted, as neither defense is believed. The court expressed this concern by stating:

> The joint trial of conspiracy defendants was originally deemed useful to prove that the parties planned their crimes together. However, it has become a powerful tool for the government to prove substantive crimes and to cast guilt upon a host of co-defendants. In this case, we are concerned with the specific prejudice that results when defendants become weapons against each other, clawing into each other with antagonistic defenses. Like the wretches in Dante's hell, they may become entangled and

> ultimately fuse together in the eyes of the jury, so that neither defense is believed and all defendants are convicted. Under such circumstances, the trial judge abuses its discretion in failing to sever the trials of the co-defendants. *Romanello*, 726 F.2d at 174.

The *Romanello* court recognized that a trial court faced with mutually antagonistic defenses abuses its discretion when it fails to ensure each defendant a fair trial. The Seventh Circuit, consistent with the decisions of the majority of other circuits, should likewise have recognized that the Defendants in this case were denied their opportunity for fair trials and should have reversed the trial court's denial of severance.

In addition to the obviously unjust situation which exists when a defendant must face two prosecutors, and the danger of confusion and blurring of roles, failure to sever defendants presenting antagonistic defenses also results in a shifting of the burden of proof from the Government to the defendant. Under these circumstances, not only is the defendant faced with convincing the jury that his version of the events is correct, the defendants faces the added, and unwarranted, burden of convincing the jury that his co-defendant's version of the events is not true.

The Seventh Circuit, in this instance, appears to have shown more concern for ministerial matters than it exhibited for protecting the rights of the defendants to fair trials.

Defendants acknowledge that judicial economy is an important concern for the court, and also recognize that

severance may not be appropriate under all circumstances involving a conflict between the co-defendants. However, the case before this Court involves not merely the antagonism caused by the different defenses of not guilty and entrapment (*United States v. Williams*, 858 F.2d 1218 (7th Cir. 1988), *cert. denied*, 488 U.S. 1010 (1989)); nor the friction caused by the conflict of a non-participation defense and an insufficiency of evidence defense (*United States v. Briscoe*, 896 F.2d 1476 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 173 (1990)); nor the discord caused by the conflict of a lack of knowledge defense and entrapment (*United States v. Rollins*, 862 F.2d 1282 (7th Cir. 1988), *cert. denied*, 490 U.S. 1074 (1989)). Under the circumstances presented in these cases, the Seventh Circuit has correctly ruled that severance is not required to ensure that defendants receive fair trials. However, until now, the court has consistently recognized the distinction between these types of conflicts and the much more serious situation which exists when co-defendants present truly antagonistic defenses. Previously, the Seventh Circuit, in conformity with the other Federal Circuits, had always recognized that confronting the jury with mutually antagonistic defenses required the Court to exercise its discretion and provide defendants with separate trials, and, until now, judicial economy, although considered by the court, always was subservient to protection of defendants' rights.

The Seventh Circuit's ruling in this case is not only in conflict with the other federal circuits, this decision conflicts with rulings and discussions in a number of previous cases within the Seventh Circuit itself. The importance of severance was previously recognized in

United States v. Shively, 715 F.2d 260 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984); the prejudice which exists when co-defendants present mutually antagonistic defenses and the appropriateness of the use of Rule 14 severance under such circumstances was discussed in *United States v. Oglesby*, 764 F.2d 1273 (7th Cir. 1985); granting severance when accepting one defendant's defense precludes acceptance of a co-defendant's defense was acknowledged in *United States v. Buljubasic*, 808 F.2d 1260 (7th Cir. 1987), *cert. denied*, 484 U.S. 815 (1987) and *United States v. Gironda*, 758 F.2d 1201 (7th Cir. 1985); and, in *United States v. Ziperstein*, 601 F.2d 281 (7th Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980) discussed above, the Seventh Circuit chose *DeLuna*, the facts of which are strikingly similar to the present case, to use as an example of mutually antagonistic defenses.

The Seventh Circuit's decision fails to acknowledge the long line of cases recognizing the appropriateness of severance under circumstances such as exist here and creates a direct conflict between the federal circuits.

When defendants present mutually antagonistic defenses they are prejudiced and cannot receive the fair trial to which they are entitled. When such prejudice exists, it is the court's "continuing duty at all stages of the trial to grant a severance." *Schaffer v. United States*, 362 U.S. 511 (1960).

This basic concept is denied by the Government, while it concedes that this case involves antagonistic defenses. Instead, it argues that a defendant is not unfairly prejudiced because his co-defendant acts as an

accuser. Brief for U.S. at 19-22. However, in *United States v. Crawford*, 581 F.2d 489 (5th Cir. 1978), the court was faced with a factual situation similar to that which exists here. In *Crawford*, the two defendants were each charged with possession of a firearm and each presented evidence that the firearm was owned by the other defendant. The court found that these defenses were irreconcilable as well as mutually exclusive. The sole defense of each was the guilt of the other. The Eleventh Circuit, discussing the prejudice which existed in *Crawford*, and the earlier, similar case of *United States v. Johnson*, 478 F.2d 1129 (5th Cir. 1973), stated:

> The degree of prejudice suffered by the defendants in the *Johnson* and *Crawford* cases was truly compelling. In both cases, there were, in effect, two prosecutors, the government and the co-defendant. The defendants in *Johnson* and *Crawford*, respectively, were inseparably intertwined due to the fact that, in each case, there were only two defendants charged with a single offense. This made it impossible for any defendant to escape from the prejudicial impact ensuring from his co-defendant's 'He did it' defense. Despite this fact, the trial court in each case refused to grant a severance even when the irreconcilable nature of the defenses clearly manifested itself. *United States v. Kopituk*, 690 F.2d 1289, 1317 (11th Cir. 1982), *cert. denied*, 463 U.S. 1209 (1983).

CONCLUSION

The Seventh Circuit's opinion in this case is not only an unwarranted departure from the existing law of severance, it is directly contrary to that body of law for cases involving antagonistic defenses. Failure to grant the Defendants' requests for severance denies them fair and impartial trials. This Court should reverse the decision of the Seventh Circuit and grant the Defendants new, separate trials.

Respectfully submitted,

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